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DIAMOND MCCARTHY LLP

909 Fanin, Suite 1500
Houston, Texas 77010
Telephone (713) 333-5100
Facsimile (713) 333-5199

Allan B. Diamond, TX State Bar No. 05801800

Email: adiamond@diamondmccarthy.com

Barbara Balliette, TX State Bar No. 00788660

Email: bballiette@diamondmccarthy.com

Eric D. Madden, TX State Bar No. 24013079

Email: emadden@diamondmccarthy.com

Special Litigation Counsel for USACM Liquidating Trust

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
BK-S-06-10727-LBR
BK-S-06-10728-LBR
BK-S-06-10729-LBR

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,

JOINTLY ADMINISTERED
Chapter 11 Cases

Debtor.

Judge Linda B. Riegle

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re:
USA SECURITIES, LLC,

Adversary No. 08-01119

Debtor.

Affects:

☐ All Debtors

☒ USA Commercial Mortgage Company

☐ USA Capital Realty Advisors, LLC

☐ USA Capital Diversified Trust Deed Fund, LLC

☐ USA Capital First Trust Deed Fund, LLC

☐ USA Securities, LLC

USACM LIQUIDATING TRUST,
Plaintiff,

v.

ROBERT A. RUSSELL; DEBORAH RUSSELL;
RUSSELL AD DEVELOPMENT GROUP, LLC;
COPPER SAGE COMMERCE CENTER LLC;
FREEWAY 101 USA INVESTORS, LLC;
BOISE/GOWEN 93, LLC; DER NV INVESCO, LLC;
FWY 101 LOOP RAR INVESTMENT, LLC; and
BG/93 INVESTMENTS, LLC; SVRB INVESTMENTS,
LLC,

Defendants.

Adversary No. 08-01119

**DECLARATION OF
GEOFFREY L. BERMAN IN
SUPPORT OF THE MOTION
SEEKING THE APPROVAL OF
THE SETTLEMENT
AGREEMENT BETWEEN THE
USACM LIQUIDATING TRUST
AND THE RUSSELL ENTITIES**

Hearing Date: August 21, 2009
Hearing Time: 9:30 a.m.

**DECLARATION OF GEOFFREY L. BERMAN IN SUPPORT OF THE MOTION
SEEKING THE APPROVAL OF THE SETTLEMENT AGREEMENT BETWEEN
THE USACM LIQUIDATING TRUST AND THE RUSSELL ENTITIES**

I, Geoffrey L. Berman, hereby declare as follows:

1. I am over the age of eighteen (18) and am mentally competent. I have personal knowledge of the facts in this matter and if called upon to testify, could and would do so.

2. I am the Court-appointed trustee of the USACM Liquidating Trust (the "USACM Trust"), and I submit this declaration in support of the Motion Seeking the Approval of the Settlement Agreement Between the USACM Liquidating Trust and the Russell Entities (the "Motion").¹

3. A true and correct copy of the Settlement Agreement is attached hereto as Exhibit "A."

4. On April 13, 2006, USA Commercial Mortgage Company ("USACM") filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court"), which bankruptcy case was jointly administered with several related cases under bankruptcy case number BK-S-06-10725-LBR (the "USACM Bankruptcy Case"). The Bankruptcy Court confirmed the Third Amended Joint Chapter 11 Plan of Reorganization (the "Joint Plan") pursuant to an order entered on January 8, 2007 (the "Confirmation Order") and the Joint Plan became effective on March 12, 2007. The USACM Trust was created pursuant to the

¹ Unless otherwise expressly stated herein, all undefined, capitalized terms shall have the meaning ascribed to them in the Motion.

1 Joint Plan and the Confirmation Order and I serve as the trustee of the USACM Trust. Pursuant
2 to the terms of the Third Amended Joint Chapter 11 Plan of Reorganization and the
3 Confirmation Order, the USACM Trust now holds any and all potential claims and causes of
4 action, whether arising pre-petition or post-petition, that USACM and the USACM Trust may
5 have or may at any time have had.

6 5. The USACM Trust has investigated potential claims against Robert A. Russell, several
7 entities he owned, controlled or managed, and his wife Deborah Russell, the sole shareholder in
8 several of the entities (collectively, the “**Russell Entities**”). As a result of the investigation, the
9 USACM Trust commenced adversary proceeding number 08-01119 against the Russell Entities,
10 entitled *USACM Liquidating Trust v. Robert A. Russell, et al.* (the “**Pending Litigation**”). In
11 that lawsuit, the USACM Trust asserted claims of aiding and abetting breaches of fiduciary duty
12 and unjust enrichment based on the Russell Entities’ granting membership interests in certain
13 projects to the USACM insiders (or entities owned and controlled by them) even though
14 USACM itself should have received those interests. The USACM Trust also alleged that the
15 Defendants were unjustly enriched because all the profits they received were the result of loans
16 that the USACM insiders fraudulently induced USACM to originate to the Russell Entities.

17 6. At my direction, the USACM Trust’s litigation counsel, Diamond McCarthy LLP, has
18 aggressively pursued the USACM Trust’s claims in the Pending Litigation and has conducted
19 extensive formal and informal written discovery and depositions.

20 7. The Russell Entities have continuously denied any liability on these claims on both
21 factual and legal grounds. The Russell Entities have not conceded any of their defenses and have
22 vigorously defended the Pending Litigation. In addition, the USACM’s Trust’s claims are novel
23 and could certainly involve lengthy appellate challenges and review. The claims are factually
24 complicated and would require significant expert testimony and legal briefing. Thus, I recognize
25 that there is no certainty as to the Trust’s success at trial on its claims if the Pending Litigation
26 was fully litigated.

27 8. The Pending Litigation is not the only matter in dispute between the USACM Trust and
28 the Russell Entities. Robert A. Russell and one of his affiliated entities have asserted large

1 proofs of claim (collectively, the “**Proofs of Claim**”) in the USA Capital Bankruptcy Case:
2 claim number 10725-00493 by Robert A. Russell against USACM in the amount of \$140,000
3 and claim number 10725-01088 by Robert A. Russell against USACM in the amount of
4 \$140,000, and claims numbers 10725-0792 and 10725-0792-2 by Copper Sage Commerce
5 Center LLC against USACM in the amount of \$3,500,000. The USACM Trust has actively
6 contested these proofs of claim.

7 9. In addition to the matters involving the USACM Trust, the Diversified Trust Deed Fund
8 (“**DTDF**”) has asserted that Robert A. Russell and several Russell entities are liable on a loan
9 that was due on March 1, 2007 (the “**DTDF Debt**”) that totaled several million dollars.

10 10. In the course of the Pending Litigation, Robert A. Russell and his wife, Deborah Russell,
11 have provided financial information to the USACM Trust relating to their assets and the assets of
12 other Russell Entities. These financial statements and evidence showed that, even if the USACM
13 Trust were successful in recovering a judgment in the Pending Litigation, the Russell Entities
14 have very little assets available to satisfy such a judgment. Thus, the Trust would encounter
15 serious difficulties in collecting on a judgment against the Russell Entities.

16 11. The USACM Trust and the Russell Entities have engaged in substantial settlement
17 negotiations to resolve the Pending Litigation and the Proofs of Claim in an effort to minimize
18 the costs of litigation and the extensive time that must be dedicated to such proceedings, and to
19 avoid the risk inherent in proceeding to trial. In addition because of the limited funds available
20 to the Russell Entities to pay any judgments against them and the Russell Entities’ demand to
21 resolve all matters related to USACM in a global settlement agreement, DTDF became involved
22 in the settlement discussions. These settlement discussions, which have been at arm’s-length and
23 in good faith, have culminated in the Settlement Agreement.

24 12. In addition to agreements in the Settlement Agreement, the USACM Trust has agreed to
25 divide the settlement payments made pursuant to the Agreement with DTDF as follows: (1) the
26 \$7,500 payment shall be made to DTDF; (2) payments under the promissory note shall be
27 divided 1/3 to the USACM Trust and 2/3 to DTDF.

28

1 13. I believe that in the Pending Litigation, the probability of success is outweighed by the
2 costs, inherent delays, and risks to be incurred in continuing the adversary proceeding.
3 Furthermore, approval of the Settlement Agreement at this time, will allow the USACM Trust to
4 avoid significant costs connected with obtaining deposition testimony of several witnesses and
5 procuring expert reports and expert testimony. If the proposed settlement is not approved, the
6 USACM Trust will be required to incur significant additional expenses to pursue the Pending
7 Litigation through what will likely be a protracted, complex, and expensive jury trial and
8 appellate process.

9 14. Moreover, even were the USACM Trust ultimately successful at trial, based on the
10 financial information made available to me, there is substantial uncertainty concerning the ability
11 to recover any resulting judgment from any of the Russell Entities.

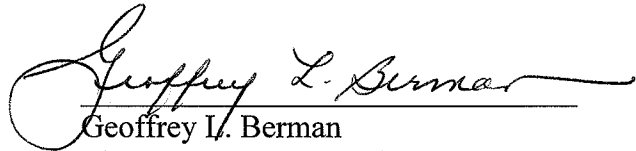
12 15. Further, the Settlement Agreement's elimination of the Russell Entities' Proofs of Claims
13 is the best possible result for the USACM Trust and its beneficiaries.

14 16. As discussed in the Motion, I believe the proposed Settlement Agreement represents a
15 fair and reasonable compromise of the Pending Litigation and Proofs of Claim that provides a
16 good result for the beneficiaries of the USACM Trust without the continued expense, time, and
17 risks of further litigation, trial, and efforts to collect on any judgment the USACM Trust may
18 ultimately obtain. Additionally, efficient resolution of the Pending Litigation and Proofs of
19 Claim is in the best interest of the USACM Trust's creditors, because it efficiently alleviates the
20 ongoing disputes and eliminates potential subsequent liability to the USACM Trust

21 17. The proposed Settlement Agreement falls within what I believe to be the reasonable
22 range of likely outcomes of the Pending Litigation, after accounting for litigation risks, costs,
23 and delay associated with trial, appeal and ultimately, if successful, collection of any judgment
24 awarded.

1 I declare under penalty of perjury that the foregoing is true and correct.

2 Executed June 12, 2009 at Los Angeles, California.

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4 

5 Geoffrey L. Berman

6 The Trustee for USACM Liquidating Trust
Development Specialists, Inc.

7 333 South Grand Ave., Suite 4070

8 Los Angeles, California 90071-1544

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2009, a true and correct copy of the foregoing DECLARATION OF GEOFFREY L. BERMAN IN SUPPORT OF MOTION SEEKING THE APPROVAL OF THE SETTLEMENT AGREEMENT BETWEEN THE USACM LIQUIDATING TRUST AND THE RUSSELL ENTITIES was served (1) by electronic transmission to all parties registered to receive ECF notification; (2) by electronic transmission to all parties on the Post-Effective Date Service List Dated March 31, 2009; and (3) by electronic transmission to counsel for the Russell Defendants, Scott A. McGath at sam@omhdlaw.com

/s/ Catherine Burrow
Catherine Burrow
Senior Paralegal
Diamond McCarthy LLP